Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1208

WILLIAM E. SCHUPPENHAUER,
Petitioner,

vs.

THE PEOPLES GAS LIGHT & COKE COMPANY,
a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT, THIRD DIVISION.

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Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William E. Schuppenhauer, Petitioner, prays that a writ of certiorari issue to review a judgment of the Appellate Court of Illinois, First Judicial District, Third Division, affirming a judgment of the Circuit Court of Cook County, Illinois, in a suit in chancery for an accounting, dismissing his suit with prejudice.

The opinion of the Appellate Court is officially reported as *Schuppenhauer* v. *Peoples Gas Light & Coke Co.*, 1975, 30 Ill. App. 3d 607, and, unofficially, as 332 N. E. 2d 583. It is set out verbatum in the Appendix.

JURISDICTION.

The judgment was dated July 3rd, 1975, and the time of its entry was July 3rd, 1975. No petition for rehearing was filed. His time for filing a petition for leave to appeal to the Supreme Court of Illinois as a matter of judicial discretion was extended to September 29th, 1975, on a timely motion for an extension of time presented to and granted by Mr. Justice Ward, one of the judges of that Court, on August 26th, 1975. His petition for leave to appeal was filed on September 29th, 1975, and denied by the Supreme Court of Illinois on November 24th, 1975.

His time for filing a petition for a writ of certiorari will expire on February 22nd, 1976.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

This Federal Question was not raised in or passed on by the Circuit Court of Cook County, Illinois, or the Appellate Court of Illinois, but it was presented to the Supreme Court of Illinois in a petition for leave to appeal as a matter of judicial discretion. We submit that we are within well recognized exceptions to the rule that this Court will not take jurisdiction and decide Federal questions raised in the State courts in that manner. The matter is covered in Point II of the Argument.

FEDERAL QUESTION PRESENTED.

Whether Section 4 of the Illinois Dead Man's Statute, Illinois Revised Statutes 1966, Chapter 51, § 4, is so arbitrary and unreasonable, that it is a violation of the 14th Amendment, Section 1, to the Constitution of the United States, by the State of Illinois, as depriving petitioner of his cause of action, and his right to an adjudication of the merits of his claim, and his property, without due process of law, and as denying to him the protection and equal protection of the laws.

ILLINOIS STATUTE INVOLVED.

Section 4 of the Evidence Act, Illinois Revised Statutes 1965, Chapter 51, § 4, provides:

> "In any action, suit or proceeding by or against any surviving partner or partners, joint contractor or joint contractors, no adverse party or person adversely interested in the event thereof, shall, by virtue of Section 1 of this act, be rendered a competent witness to certify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; and in every action, suit or proceeding a party to the same who has contracted with an agent of the adverse party—the agent having since died—shall not be a competent witness as to any admission or conversation between himself and such agent, unless such admission or conversation with the said deceased agent was had or made in the presence of a surviving agent or agents of such adverse party, and then only except where the conditions are such that under the provisions of Sections 2 and 3 of this act he would have been permitted to testify if the deceased person had been a principal and not an agent. [As amended by act approved April 24. 1899. L.1899, p. 216.]"

STATEMENT OF THE CASE.

This action was brought by petitioner for an accounting in equity. The cause was assigned to a master in chancery on a limited reference "for the purpose of taking testimony and reporting same together with his conclusions of fact and law" on two issues. At the inception of the case, respondent made a standing objection to plaintiff's testimony on the basis of Section 4 of the Illinois Evidence Act, Ill. Rev. Stat., Ch. 51, § 4 (1965). Respondent also objected to the admission into evidence certain exhibits on the same ground and on the additional ground that they were self-serving hearsay. These objections were renewed throuhout the case and at the close of

the plaintiff's case it was agreed that the master would rule on the objections.

A Master's report was then issued granting respondent's objections in part and overruling them in part. The master also made certain findings. Respondent filed objections to the Master's Report which were denied by the master in a Supplemental Report. Exceptions were taken by the respondent to the Master's Report and Supplemental Report. The Circuit Court of Cook County sustained respondent's exceptions, found that the master should have granted respondent's motion based on Section 4 of the Evidence Act and dismissed petitioner's complaint with prejudice. Petitioner appealed to the Illinois Appellate Court. First District, where the case was assigned to the Third Division. The Appellate Court affirmed the judgment of dismissal. No petition for a rehearing was filed. The Supreme Court granted petitioner's timely motion for a extension of time to file a petition for leave to appeal as a matter of judicial discretion. He filed a timely petition for leave to appeal, raising the Federal constitutional question as to the validity of Section 4 of the Evidence Act. The Supreme Court denied petitioner's timely petition for leave to appeal on November 24, 1975.

Petitioner's time for filing his petition for a writ of certiorari will expire on February 22, 1976.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. Section 4 of the Illinois Dead Man's Statute Is So Arbitrary and Unreasonable That It Is a Violation of the 14th Amendment, Section 1, to the Constitution of the United States. By the State of Illinois, as Depriving Petitioner of His Cause of Action, and His Right to an Adjudication of the Merits of His Claim, and His Property, Without Due Process of Law, and as Denying to Him the Protection and Equal Protection of the Laws.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. See Advisory Committees Notes on the proposed Federal Rules, Sec. 501 and Sec. 601.

McCormick's Handbook of the Law of Evidence, Second Edition, by Edward W. Cleary, General Editor, West Publishing Co. 1972, states:

> "Most commentators agree that the expedient of refusing to listen to the survivor is, in the words of Bentham, a 'blind and brainless' technique. In seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of creating injustice to the other. The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard. A searching cross-examination will usually, in case of fraud, reveal discrepancies inherent in the 'tangled web' of deception. In any event, the survivor's disqualification is more likely to balk the honest than the dishonest survivor. One who would not balk at perjury will hardily hestitate at suborning a third person, who would not be disqualified, to swear to the false story.
>
> "Slowly, the lawmakers are being brought to see the blindness of the traditional survivors' evidence acts, and liberalizing changes are being adopted." (pp. 143-144.)

To the same effect: 2 Wigmore, Evidence § 488, §§ 575-580. Ray, Dead Man's Statutes, 24 Ohio State Law Journal 89 (1963).

In Jones on Evidence, 6th Edition 1972, Vol. 3, pages 672-675, Stephen A. Gard, the author, states:

> "§ 20:35. CORPORATE AGENTS' TRANSACTIONS.
>
> Courts have reasoned that where it appears that the agent in a transaction represented a public or private corporation, the adverse party who dealt with the agent is not competent to testify as to the transaction if the agent has since died. This is on the somewhat artificial ground that the corporation is not a surviving entity which can stand in the testimonial shoes of the deceased agent, *and ignores the fact (as the statute no doubt does) that the estate of the agent has no interest in the action.*" (Emphasis ours.) ("50. . . . There are authorities who support the opposite rule. *South Baltimore Co.* v. *Muhlbach,* 69 Md. 395, 16 A. 117; *Bexar Asso.* v. *Newman* (Tex. Crim.) 25 SW 461. See *Augusta Naval Stores Co.* v. *Forlaw,* 135 Ga. 138, 65 SE 370, holding testimony of third party to contract admissible though agent of corporation had died.")
>
> If the transaction involved two agents of the corporation and only one of them has died, so that there is a survivor who has personal knowledge of the transaction, there appears to be no remaining reason for holding the adverse party to be incompetent to testify as to the transaction with the agents." ("51. *Burk* v. *Louisville & N. R. Co.,* 219 Ky. 163, 292 SW 486 (citing Jones on Evidence 2d ed c 20), reviewed 16 Ky. LJ 278; *Lyttle* v. *Chicago & W. M. Ry. Co.,* 84 Mich. 289, 47 NW 571; *Birdsall* v. *Coon,* 157 Mo. App. 439, 139 SW 243.")

II. This Case Comes Within the Rulings of This Court That the Court Will Review Constitutional Issues That Were Not Raised in or Passed on by the State Courts, and, if Not, the Court Should Stay All Proceedings in This Court, and Refer the Constitutional Question Raised, to the State Courts for Decision.

The Federal constitutional question presented was not raised in or passed on by the Trial Court or the Appellate Court of Illinois but it was raised in the petition for leave to appeal to the Supreme Court of Illinois as a matter of judicial discretion, as one of the three major points relied on for reversal of the judgment, in that respondent should not be permitted to object to petitioner's testimony on the basis of the Dead Man's Act "as a matter of equity and good conscience, and as a matter of due process of law and the protection and equal protection of the laws, under the 14th Amendment, Section I, to the Constitution of the United States, * * * and as a matter of sound public policy."

This is essentially the Federal Question previously stated in this petition.

If the petitioner's petition that the Federal Question stated requires an affirmative answer, it necessarily follows that the portion of Rule 601 of the Federal Rules of Evidence, effective July 1, 1975, reading as follow:

> "However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.";

and the analogous Federal Rule 501 for determining the privilege of a witness, are also unconstitutional.

The Federal constitutional question was not raised in, or passed on by, the Illinois courts in this litigation, but the manner in which the Illinois statute has been construed and enforced for over 75 years, commencing with *Smith* v. *Billings,*

1898, 177 Ill. 446, 53 N. E. 690, to and including the decision of the Appellate Court of Illinois in this case, coupled with the decision of the Supreme Court of Illinois in *Lueth* v. *Goodknecht* 1931, 345, Ill. 197, 177 N. E. 690, holding that Sections 1, 2, and 4, of the Evidence Act were not unconstitutional in the face of the contention that they "are not uniform in operation upon all persons and property similarly situated," the Court holding that the statute's classifications of persons or objects were not arbitrary but were based upon some substantial difference bearing proper relation to each classification, shows that it would have been useless to have raised the constitutional question in either the trial court or the Appellate Court by reason of the doctrine of stari decisus.

This case is within the rule enunciated by this Court on several occasions, that where there has been "fundamental error" clearly determinative of a case, this Court will consider the issue even though it was not raised below (*Terminello* v. *City of Chicago* 1949, 333 U. S. 1; *Silback* v. *Wilson & Co.* 1941, 312 U. S. 1; *Mahler* v. *Eby* 1924, 264 U. S. 32).

4 C. J. S. Appeal and Error, § 234 pp. 703-704 states:

> "Under various circumstances, however, the constitutionality of a statute may be first considered on appeal, and where a party's rights are dependent on a statute, and a question of fundamental error is presented, the appellate court before determining such rights, may consider whether the statute is constitutional, although its constitutionality is first urged on appeal. Likewise, where the issue raises a matter of public policy or concern, constitutionality may be considered, although raised for the first time on appeal."

In *Allen* v. *State Board of Elections*, 1969, 393 U. S. 544, 554, 89 S. Ct. 817, 825-6, this Court said:

> "Appellants first raised the applicability of § 5 in their jurisdictional statement with this Court. We are not precluded from considering the applicability of § 5, however. The Virginia legislation was generally attacked on the ground that it was inconsistent with the Voting Rights Act. Where all the facts are undisputed, this Court may, in the interests of judicial economy, determine the applicability

> of the provisions of that Act, even though some specific sections were not argued below. [See Boynton v. Virginia, 364 U. S. 454, 457, 81 S. Ct. 182, 184, 5 L. Ed. 2d 206 (1960), Cf. Bell v. Maryland, 378 U. S. 226, 237-242, 84 S. Ct. 1814, 1823, 12 L. Ed. 822, 84 S. Ct. 1814, 1823, 12 L. Ed. 822, (1963); Silber v. U. S., 370 U. S. 717, 718, 82 S. Ct. 1287, 1288, 8 L. Ed. 2d 798 (1962)]."

In the event this Court does not agree with our position that it has jurisdiction to review this case on constitutional grounds because the question was not raised in the trial court or in the Appellate Court, and it was raised for the first time in a petition for leave to appeal to the Supreme Court of Illinois as a matter of judicial discretion, Petitioner prays that on the authority of *Cole* v. *Arkansas*, 1948, 333 U. S. 196; *Musser* v. *Utah*, 1948, 333 U. S. 95; *Von Moltke* v. *Gilles*, (1948), 332 U. S. 708; and *Walker* v. *Eby*, 1924, 264 U. S. 32, 45; that this Court stay proceedings on this petition for writ of certiorari and refer the Federal Constitutional question raised to the Illinois Appellate Court, First District, Third Division, or to the Circuit Court of Cook County, Illinois, for its decision, subject to review by the Supreme Court of Illinois, if convenient or necessary.

CONCLUSION.

For the reasons stated, Petitioner prays that the Court will issue a writ of certiorari to review the decision of the Appellate Court of Illinois, First Judicial District, or, in the alternative, will stay all proceedings on this petition, and will issue an order referring the Federal constitutional question raised to the State courts for adjudication, and review by this Court.

Respectfully submitted,

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APPENDIX A.

WILLIAM E. SCHUPPENHAUER, *Plaintiff-Appellant*, v. PEOPLES GAS LIGHT & COKE COMPANY, *Defendant-Appellee*.

(No. 59663; Judgment affirmed.)

First District (3rd Division)—July 3, 1975.

1. WITNESSES (§ 59)—*broad policy of Evidence and Depositions Act is to allow interested parties to testify in their own behalf.*

2. WITNESSES (§ 59)—*purpose of Dead Man's Act.*

Purpose of Dead Man's Act is to enable parties to enjoy comparable positions with respect to testimony by them on material matters.

3. WITNESSES (§ 119)—*parol evidence of physical transactions is not prohibited by Dead Man's Act.*

While Dead Man's Act prevents party from relating any conversations with or admissions by opposing party's deceased agent, it does not forbid parol evidence of physical transactions with such agent (Ill. Rev. Stat. 1973, ch. 51, par. 4).

4. TRADEMARKS, TRADE NAMES AND UNFAIR COMPETITION (§ 6.5)—*idea may be disclosed in such manner that recipient may have obligation not to use idea commercially.*

Idea may be disclosed in such manner that its recipient may incur binding obligation not to use idea commercially and not to disclose it, except as contemplated by negotiations.

5. FRAUD AND DECEIT (§ 58.5)—*fact that business obligations are conducted does not justify inference of fiduciary obligation.*

6. WITNESSES (§ 130)—*objection on ground that opposing party was unable to present evidence as to conversation with deceased party in presence of agent before death of agent may be waived.*

Objection on ground that surviving agent has died before opposite party has opportunity to oppose testimony as to conversation with deceased party made in presence of agent can be presented, may be waived if objecting party has in some way manifested his satisfaction with state of evidence prior to agent's death.

7. WITNESS (§ 130)—*when trial court may find that purpose of Dead Man's Act to achieve mutuality has been met.*

Even when no grounds for waiver of objection to testimony as to conversation with deceased party made in presence of surviving agent on ground such agent had died before contradictory testimony can be presented appear, trial court may find that purpose of Dead Man's Act to achieve mutuality has been met.

8. TRIAL (§ 110)—*use of ongoing motion challenging competence of testimony serves judicial economy.*

Use of conventional trial procedure, such as ongoing motion challenging competence of testimony, is not inherently an instrument for delay but a device which promotes and serves judicial economy.

9. ACCOUNTING SUITS (§ 11)—*finding that plaintiff failed to make prima facie case affirmed upon review—action for accounting alleging use of cost-saving ideas allegedly disclosed 30 years earlier in confidence to company officials.*

In action for accounting against defendant light company for defendant's use of cost-saving ideas allegedly disclosed by him in confidence 30 years earlier to company officers pursuant to understanding that if his suggestions were employed by defendant he would be paid an agreed proportion of resulting savings, where officers with whom plaintiff conversed in 1933 were no

longer living at time plaintiff testified as to events of 1933 and defendant's agent, in whose presence deceased officers discussed with plaintiff various features of plaintiff's plans as well as his compensation if his ideas were used by defendant, while living at time plaintiff testified, died before defendant could present testimony contradicting plaintiff's testimony as to such discussion, and therefore conversations with such officers as well as those made in presence of agent were inadmissible, and where none of plaintiff's remaining admissible testimony explained nature of understanding reached between plaintiff and defendant, chancellor's finding that plaintiff failed to make prima facie case was affirmed (Ill. Rev. Stat. 1967, ch. 51, par. 4; Ill. Rev. Stat. 1973, ch. 51, par. 4).

Appeal form the Circuit Court of Cook County; the HON. CHARLES R. BARRETT, *Judge*, presiding.

Roger Nelson, of Griffin, Guinan & Griffin, of Chicago, for appellant.

Karl Berolzheimer, of Ross, Hardies, O'Keefe, Babcock & Parsons, of Chicago, for appellee.

MR. JUSTICE DEMPSEY delivered the opinion of the court:

In 1963 William Schuppenhauer filed an action for an accounting against the Peoples Gas Light & Coke Company, for the company's use of cost-saving ideas allegedly disclosed by him in confidence 30 years earlier to company officers pursuant to an understanding that if his suggestions were employed by the company he would be paid an agreed proportion of the resulting savings. The cause was assigned to a master in chancery to determine the truth of the allegations of the complaint and whether they gave rise to an enforceable obligation by the defendant. In 1966 the master heard the plaintiff's case which consisted solely of Schuppenhauer's own testimony, and received in evidence a number of exhibits. He submitted a report in 1969, and a supplemental report in 1971, concluding that the evidence demonstrated the company's liability. However, the chancellor

sustained the defendant's exceptions to the reports, found that the competent evidence did not make out a prima facie case, and ordered the cause dismissed with prejudice.

Our disposition of Schuppenhauer's appeal turns upon the adequacy of his testimony regarding the events of 1933. The company officers with whom he conversed in 1933 were no longer living at the time he testified and his alleged conversations with them were stricken. He raises two issues: (1) whether, if all the conversations were properly stricken, there nevertheless remains in the record evidence of transactions with those officers which proves the creation of an enforceable obligation; and (2), whether the trial court erred in striking his testimony of conversations with and admissions by these agents which took place in the presence of another agent, Frank Griffith, who was living at the time Schuppenhauer testified, but who died after the plaintiff's case had been completed before the master.

In 1933, the plaintiff, a wholesaler of confections, operated the William E. Schuppenhauer Service from his home. Through the latter operation he promoted a cost-savings plan for firms with large billing operations. The plan was printed on a two-page folder and was summarized in the document's opening paragraph:

> "Write all drafts, checks, including dividend drafts or checks, invoices, requisitions, statements (not due), notices, etc., which are sent by mail in envelopes and can be condensed sufficiently, on postal or post-cards with or without a reply card attached and utilize all possible space thereon to bring about the desired result in conjunction with or without an exact copy for the files."

The plan envisioned savings in labor, paper and postage costs.

Schuppenhauer testified that beginning in July of 1933 he wrote repeatedly to solicit interviews with several officers of the defendant, including George Mitchell, its president. Carbon copies of several letters were introduced. The text of the July 15 letter to Mitchell is representative of these communications:

"Dear Mr. Mitchell:—

If we stop a profit 'leak',—you will increase your net profits.

If you see and adopt our suggestion, our fees will be only a portion of your savings for a short while for our services in bringing our Cost Cutting Plan to you. If you do not adopt our suggestion, YOU OWE US NOTHING. You will be the sole judge of the usefulness of the idea.

Certainly you can't lose. You can only win.

It costs you nothing to talk it over.

Just have your secretary return the enclosed post card.

Yours for greater net profits.

WM. E. SCHUPPENHAUER SERVICE."

Schuppenhauer produced two letters from Albert Tossell, assistant to Mitchell. The first said that his letters would be brought to Mitchell's attention, but the second, dated September 8, said that "* * * this Company is not interested in the service to which your previous correspondence refers." Notwithstanding this rebuff, Schuppenhauer testified that his persistence was rewarded when, on September 28, 1933, Mitchell telephoned him and arranged for him to meet Tossell. Schuppenhauer said he met with Tossell on the morning of October 5 and returned the same afternoon to speak to the company treasurer, William Weldon. The following day he described the plan to Moses Reeder, the comptroller of the company, and showed him sample card stock upon which checks could be printed. October 9 he sent copies of the printed plan to Reeder and Weldon by registered mail. He stated that on October 12 he met Reeder and Weldon in Reeder's office and demonstrated to them the electrical conductivity of graphite markings on card stock to prove its potential for machine processing after marking by meter readers. He suggested that the International Business Machines Corporation possessed the technology to build a processing machine. The group was joined by Frank Griffith, an assistant to Mitchell. In

his presence, the others discussed various features of the plans as well as the measure of compensation for Schuppenhauer if his ideas were used by the company. Schuppenhauer later mailed a confirmatory letter to the persons with whom he had spoken, summarizing the discussion of October 12. Copies of this letter were submitted as exhibits. Schupperhauer recalled that he prefaced every conversation with a reminder that his proposals were made in confidence. He had no further communications with any representative of Peoples Gas, but he claimed that in 1958 he learned that the company had begun postcard billing (mailed in envelopes) in 1951, and that after 1957 it sent its bills bimonthly, via stubbed postcards.

All of Schuppenhauer's testimony was received subject to the company's standing objection that it was incompetent because of the Dead Man's Act. The company also objected to the admission of virtually all of the plaintiff's exhibits as self-serving and hearsay, since they consisted of his own notes, printed forms and carbon copies of communications purportedly sent by him to company agents.

It had been agreed by the parties that in order to conserve time the defendant's objections would not be ruled upon by the master until the close of the plaintiff's case. The hearings were recessed for that purpose in November 1966, but the master's report did not issue until January 1969. It had been stipulated that Weldon, Mitchell, Reeder and Tossell—the persons with whom Schuppenhauer negotiated in 1933—were deceased, and the master ruled that they were contracting agents within the meaning of section 4 of the evidence and depositions act (Ill. Rev. Stat. 1967, ch. 51, par. 4), and that under the statute Schuppenhauer's testimony of conversations with them was inadmissible except to show that there were transactions between the parties. The master ruled, however, that the conversation of October 12 would be admitted because Griffith, who witnessed the conference of that date but did not participate in it, was a surviving agent within the meaning of the statute. The master

found the plaintiff's documents admissible to show transactions and that, based upon the admissible evidence, the liability of Peoples Gas had been established.

The question of the admissibility of the October 12 conversation was further complicated by Griffith's death 3 days after the master filed his report. The company's major exceptions to the report were that it purported to be a final report to the court although the case had been taken under advisement for the sole purpose of ruling upon objections to the plaintiff's testimony, and that Griffith's death before the defendant could present its case made the October 12 conversation inadmissible. Prior to the issuance of the master's supplemental report, the company waived presentation of an affirmative case, mooting its first exception. In his supplemental report, the master rejected the second argument. However, the chancellor found that the death of Griffith had rendered Schuppenhauer's testimony of the October 12 conversation inadmissible and that without it his evidence did not make out a prima facie case.

• 1, 2 The broad policy of the evidence and depositions act (Ill. Rev. Stat. 1973, ch. 51, par. 1 *et seq.*) is to allow interested parties to testify in their own behalf. But this rule of general competency is limited by requirements of mutuality—set forth in sections 2, 4 of the act—which are commonly termed the "Dead Man's Act," whose purpose is to enable parties to enjoy comparable positions with respect to testimony by them on material matters. (*Foster* v. *Hart* (1888), 29 Ill. App. 260; *Henry* v. *Tiffany* (1880), 5 Ill. App. 458; *In re Estate of Colewell* (1972), 9 Ill. App. 3d 247, 292 N. E. 2d 96.) When one interested party is incapable of testifying, the danger of undetected perjury by the other party is increased. Furthermore, the influence of a personal interest is likely to alter a party's perception of events regardless of his intent. Since self-serving statements are difficult to evaluate even with the benefit of cross-examination, they should not be admitted unless they can be

balanced by the equally self-serving testimony of the opposite party.

Section 4 of the act provides:

> "[I]n every action, suit or proceeding a party to the same who has contracted with an agent of the adverse party—the agent having since died—shall not be a competent witness as to any admission or conversation between himself and such agent, unless such admission or conversation with the said deceased agent was had or made in the presence of a surviving agent or agents of such adverse party * * *."

It is not disputed that under section 4 Schuppenhauer was incompetent to testify about his conversations with the deceased agents of Peoples Gas which occurred outside the presence of a surviving company agent. The parties differ, however, in their interpretation of the terms "surviving agent" and "conversations."

Schuppenhauer first contends that those aspects of his testimony and his exhibits which concern the general nature of his business in 1933, and the disclosures made by him to the defendant's agents are admissible as evidence of transactions, without regard to whether they occurred in the context of conversations with the deceased men.

• 3 Although section 4 prevents a party from relating any conversations with or admissions by the opposing party's deceased agent, it does not forbid parol evidence of physical transactions with such agent (*Helbig* v. *Citizens' Insurance Co.* (1908), 234 Ill. 251, 85 N. E. 897). Parties have been held competent to testify that a deceased agent delivered documents and took payment (*Helbig* v. *Citizens Insurance Co.*) or made payment. (*People* v. *Borders* (1889), 31 Ill. App. 426.) On the other hand, neither the statutory language nor its purpose to place parties upon an equal footing may be evaded by indirection. Interested witnesses cannot testify to the substance and legal effect of a conversation in place of the actual words spoken. (*Henry* v. *Tiffany.*) Nor may one in Schuppenhauer's position

dissect a conversation, telling his own statements and then supplying the import of the dead men's contribution by process of negation or implication. Like the Minnesota statute, our own act forbids the relation of a "conversation with" the deceased agent, and that "* * * is not a one sided affair in which only what the decedent said is to be considered." *Pomerenke* v. *Farmers Life Insurance Co.* (1949), 228 Minn. 256, 36 N. W. 2d 703.

When the inadmissible conversations are swept away, some portions of Schuppenhauer's testimony remain. In addition to the description of his background and the general nature of his business, he could competently relate that in the summer of 1933 he repeatedly solicited interviews with representatives of Peoples Gas by mail, assuring them that, "It costs you nothing to talk it over"; that eventually he met several times with officers of the company and that during those meetings he displayed samples of perforated, stubbed postcards to them and mailed them copies of his printed plan. But none of the evidence explains the nature of the understanding reached between Schuppenhauer and the defendant. The omission is a fatal one under the theory upon which the case was brought.

• 4, 5 The complaint charged that by confidentially communicating his ideas to the defendant's agents, Schuppenhauer became the beneficiary of a fiduciary relationship. An idea may, it is true, be disclosed in such a manner that its recipient may incur a binding obligation not to use the idea commercially and not to disclose it, except as contemplated by the negotiations. (*Booth* v. *Stutz Motor Car Co.*, 56 F. 2d 962 (7th Cir. 1932).) But when ideas or plans are come by under circumstances imposing no restraint, such as by voluntary communication, they may be used without any obligation to account. (*Hughes* v. *West Publishing Co.* (1922), 225 Ill. App. 58.) The fact that business transactions are conducted does not justify an inference of a fiduciary obligation. So, unless the alleged confidentiality is predicated upon a preexisting relation of trust with the disclosee-

defendant, it is incumbent upon a plaintiff to show not merely that he meant to place confidence in the defendant, nor even that he expressed that intent, but also that the defendant at least impliedly accepted that confidence and agreed to respect it. (See *Allen-Qualley Co.* v. *Shellmar Products Co.*, 31 F. 2d 293 (D. C. Ill. 1929), *aff'd*, 36 F. 2d 623; *Booth* v. *Stutz Motor Car Co.*) Granting that Schuppenhauer disclosed his plan and mailed copies of it to the defendant, that says nothing about the understanding with which it was received. And the Dead Man's Act prevents him from explaining the nature of any agreement reached during his conversations.

The admissibility of the conversation with Reeder and Weldon which occurred in the presence of Griffith on October 12, 1933, depends on the posture of the master's hearing at the time that hearing adjourned. As we have noted, the statute permits the relation of such a conversation if it took place in the presence of a surviving agent. However, if a party testified about a conversation heard by a surviving agent and the agent dies before the opposite party has an opportunity to oppose the testimony, the testimony is rendered incompetent. (*Smith* v. *Billings* (1898), 177 Ill. 446, 53 N. E. 81.) The gas company asserts that it had no opportunity to call Griffith as a witness because the hearing was recessed—to allow the master to rule on its accumulated objections—before it presented its defense. On the other hand, Schuppenhauer asserts that the company waived any objection to the October 12 conversation when it agreed to present no affirmative case of its own. He further argues that the availability of a partial discovery deposition given by Griffith places him and the company in comparable testimonial positions and therefore his testimony of the October 12 meetings is competent.

• 6, 7 An objection on the ground that a surviving agent has died before contradictory testimony can be presented may be waived, if the objecting party has in some way manifested his satisfaction with the state of the evidence prior to his agent's death, *e.g.*, by choosing not to call him as a witness at the appropriate time. Or, even when no grounds for waiver appear, the court may find that the purpose of the Dead Man's Act to achieve mutuality has been met. Both of these circumstances were present in *Brubaker* v. *Gould* (1962), 34 Ill. App. 2d 421, 180 N. E. 2d 873. Gould died before presenting his defense, but the majority of a divided appellate court decided that he had nevertheless had a full opportunity to present his version of the events related by his opponent. The court emphasized that Gould had been called by the plaintiffs to testify under section 60 of the Civil Practice Act and was also examined by his own counsel at that time. Further, when he died, the case was under the master's consideration on his motion for a finding in his favor, filed at the close of the plaintiff's case. This the court accepted as evidence of Gould's satisfaction with the comprehensiveness of the evidence of record.

Schuppenhauer claims that the parties decided in November 1966, to submit the case to the master for final conclusions based solely on the plaintiff's evidence, but that the gas company, when surprised by an adverse finding in 1969, objected to admission of the October 12 conversation and insisted that the master's report was premature. We find this claim unsubstantiated by the record, and indeed, no mention of waiver appears in the master's supplemental report. At the outset of the 1966 hearings it was agreed that all of Schuppenhauer's testimony would be heard before the master ruled on the defendant's objections to it. When Schuppenhauer had finished testifying he chose to close his case; at that time he expected that the company would present a case of its own. His counsel explained:

> "We close our affirmative proof with regard to the matters submitted in the limited reference except as stated, that we reserve the right, and we understand it is agreed that we may do so, to put in additional proof for the purpose of rebutting the affirmative defenses which might be raised under the limited reference."

The master then directed each party "* * * to file a brief with reference to its position on the Evidence Act relative to Mr.

Schuppenhauer's testimony * * *." No other communication among the parties and master appears of record until his report was issued in January 1969, 3 days before Griffith's death. In February 1969, the defendant filed its objections, complaining that the report had exceeded its previously agreed scope and that the conversation in Griffith's presence was now incompetent because of his death. Much later, in 1970 or 1971, the company agreed to present no case in order to expedite matters. It is clear from this chronology of events that at the time Griffith died the defendant had not agreed to forego the presentation of its case. When the company did waive its case at the later date, that did no operate retroactively to retract its 1969 objection to the admission of the October 12 conversation.

• 8 Nor was the defendant in any way estopped from raising this objection because of the long delay while the master prepared his initial report. If the delay is chargeable to anyone it is to the master. In any event, the use of conventional trial procedure, such as an ongoing motion challenging the competency of testimony, is not inherently an instrument for delay. To the contrary, such a devise promotes and serves judicial economy.

The provisions of the Dead Man's Act should be applied in a manner which effectuates its purpose (*Hill* v. *A. J. Canfield & Co.*, 157 F. 2d 849 (7th Cir. 1946)), and strict application of the policy of mutuality can nowhere be more appropriate than here, where one party purports to vividly recall conversations which for most men would at best be faded memories. Unlike *Brubaker & Gould*, there was no equality of testimony between the parties regarding the October 12 conversation. Griffith was not called by Schuppenhauer to testify under section 60 and no statements by him about the matter at issue appear of record. His incomplete discovery deposition, taken by the plaintiff, is not an acceptable substitute for testimony in court. Far more reliable records, such as a transcript from a previous trial, have been rejected when tendered for such a purpose. *Trunkey* v. *Hedstrom* (1890), 131 Ill. 204, 23 N. E. 587.

• 9 The chancellor correctly sustained the exceptions of the defendant to the master's reports. The plaintiff's evidence, as it is limited by application of the Dead Man's Act, is simply insufficient to demonstrate that the company ever incurred any obligation to him. Further, nothing in the record suggests that Peoples Gas was guilty of fraud or was unjustly enriched. (*Cf. Allen-Qualley Co.* v. *Shellmar Products Co.*) Rather, the two-decade delay before the company began to implement business practices having any similarity to Schuppenhauer's ideas compels the conclusion that his suggestions were dismissed as impractical in 1933.

The judgment of the circuit court is affirmed.

Affirmed.

McGLOON, *P. J.*, and MEJDA, *J.*, concur.

Supreme Court, U. S.
FILED
MAR 23 1976
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1208

WILLIAM E. SCHUPPENHAUER,

Petitioner,

vs.

THE PEOPLES GAS LIGHT & COKE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District, Third Division

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Appellate Court of Illinois, First Judicial District, Third Division, is officially reported at 30 Ill. App. 3d 607 (1975), and, unofficially, at 332 N.E. 2d 583. The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal on November 24, 1975 without entering a written decision.

JURISDICTION

As is further discussed in Respondent's Argument herein, the jurisdiction of this Court to review by writ of certiorari a state court decision wherein the validity of a state statute is drawn into question as repugnant to the United States Constitution is improperly invoked by Petitioner under 28 U.S.C. § 1257(3). As Petitioner's Petition for a Writ of Certiorari (Page 2) reveals:

> This Federal Question was not raised in or passed on by the Circuit Court of Cook County, Illinois, or the Appellate Court of Illinois, but was presented to the Supreme Court of Illinois in a petition for leave to appeal as a matter of judicial discretion.

Since the federal constitutional issue raised in the Petition for a Writ of Certiorari was not properly and timely presented before the state courts below and not passed upon by the state courts, there can be no review by this court by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

In 1963 Petitioner filed a complaint for an accounting in equity in the Circuit Court of Cook County, Illinois, alleging that Respondent had appropriated certain ideas and procedures allegedly originated by Petitioner and allegedly disclosed to Respondent in confidence in 1933. On a limited reference to a Master, Respondent objected to Petitioner's evidence which consisted solely of Petitioner's uncorroborated testimony and certain exhibits, primarily letters and self-serving personal records of Petitioner, principally on the ground that such evidence was inadmissible under Section 4 of the Illinois Evidence Act, Illinois Revised Statutes, Chapter 51, Section 4 (1965) which prohibits and renders incompetent testimony by an adverse party as to admissions or conversations of deceased corporate agents unless a surviving agent is available and competent to testify as to the same admissions or conversations. Respondent also objected that the exhibits constituted self-serving hearsay.

The Master reserved his ruling on Respondent's objections until the conclusion of all of the Petitioner's evidence and then overruled objections of Respondent to the admissibility of Petitioner's evidence. Solely on the basis of Petitioner's evidence (Respondent not having yet introduced any evidence), the Master concluded that there was an enforceable obligation on the part of Respondent to compensate Petitioner.

Upon an agreed record, the Circuit Court of Cook County, Illinois held that the Master erred in his application of Section 4 of the Illinois Evidence Act in

denying Respondent's motion to strike Petitioner's testimony and exclude Petitioner's exhibits. The court further held that without Petitioner's testimony and exhibits, there was no evidence either in the record or available to establish an enforceable obligation on the part of Respondent to compensate Petitioner. The complaint was dismissed with prejudice.

The Illinois Appellate Court, First District, Third Division, affirmed the Circuit Court. On November 24, 1975, the Illinois Supreme Court denied Respondent's Petition for Leave to Appeal. The federal constitutional issue asserted herein as the basis for jurisdiction of this Court was first raised in Respondent's Petition for Leave to Appeal to the Illinois Supreme Court, filed September 29, 1975.

ARGUMENT

Petitioner has failed to properly raise or preserve in the proceedings below the sole federal question presented to this Court for review and asserted as the basis for this Court's jurisdiction. The decisions of this Court have been unequivocal in holding that federal constitutional issues not considered below will not be passed on by this Court. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Tacon v. Arizona*, 410 U.S. 351 (1973). The reasons for this policy have been clearly enumerated:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92 (1966), they should be given the first opportunity to consider them. *Cardinale v. Louisiana*, 394 U.S. at 439.

Since Petitioner failed to raise the constitutional issue before the courts of the State of Illinois, his Petition for a Writ of Certiorari must be denied. Petitioner's attempt

to present his constitutional issue to the Illinois Supreme Court in his Petition for Leave to Appeal to that tribunal did not serve to raise or preserve this federal question below. Petitioner's attempted appeal to the Illinois Supreme Court on constitutional grounds was barred under Illinois law. Since Petitioner had not raised the constitutional issue before at any time in the proceedings before the Master, the Circuit Court of Cook County or the Illinois Appellate Court, he could not raise it before the Illinois Supreme Court on appeal. *Mechanics' & Traders' Savings Ass'n. v. People ex rel. Auditor of Public Accounts*, 184 Ill. 129, 56 N.E. 346 (1900); *People v. Amerman*, 50 Ill. 2d 196, 279 N.E. 2d 353 (1971).

The decisions of this Court are clear that the question of whether a federal question has been timely and properly raised or presented in the state court system is controlled by state law and will be followed by this Court. *Atlantic Coast Line R.R. Co. v. Mims*, 242 U.S. 532 (1917); *Hartford Life Insurance Co. v. Johnson*, 249 U.S. 490 (1919). Petitioner failed to present his constitutional issue before the Illinois courts and cannot now seek the jurisdiction of this Court on petition for writ of certiorari for an initial review of this constitutional issue.

Jurisdiction in this case is controlled by this Court's decision in *Pennsylvania R.R. Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936). There it was held that this Court lacks jurisdiction to consider constitutional questions which the highest court of the state declined to hear because the issues were not raised or presented below. This Court there stated:

> The Illinois statute requires that in cases involving construction of the Federal Constitution

> appeals from circuit courts shall be taken directly to the supreme court. And, as definitely shown by its decisions, that court will not take jurisdiction unless it appears from the record that the constitutional question was urged in the lower court, the ruling on it preserved in the record and the error assigned on appeal. While the order of that court transferring the case does not specify the grounds on which it was based, the petitioner states that the supreme court necessarily held the constitutional questions had not been properly raised and that, on the oral argument, the chief justice stated that the transfer would be made because of petitioner's failure properly to raise and preserve the constitutional questions. *As the highest court of the State declined to consider them because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them.* (Emphasis added.) *Pennsylvania R.R. Co. v. Illinois Brick Co.*, 297 U.S. at 462-63.

This Court has no jurisdiction to review constitutional claims never properly presented or considered below.

Since this Court has no jurisdiction in this matter, Petitioner's Petition for a Writ of Certiorari must be denied.

Petitioner's contention (Page 8) that "it would have been useless to raise the constitutional question in either the trial court or the Appellate Court by reason of the doctrine of stare decisis" cannot be taken seriously and only diminishes the seriousness of the unarticulated and unreasoned constitutional argument presented to this Court.

There are no grounds for invocation of this Court's jurisdiction on a writ of certiorari on Petitioner's assertion that the decision below has been decided erroneous-

ly. The opinion of the Illinois Appellate Court, First District, entered July 3, 1975, the full text of which is set out as Appendix A of Petitioner's Petition for Writ of Certiorari, affirming the order of the Circuit Court dismissing Petitioner's action for an accounting, correctly applied to this case Section 4 of the Illinois Evidence Act, Illinois Revised Statutes, Chapter 51, Section 4 (1965), and numerous decisions of Illinois courts: *Smith v. Billings*, 177 Ill. 446, 53 N.E. 81 (1898); *Trunkey v. Hedstrom*, 131 Ill. 204, 23 N.E. 587 (1890); *Helbig v. Citizens' Insurance Co.*, 234 Ill. 251, 84 N.E. 897 (1908); and *Brubaker v. Gould*, 34 Ill. App. 2d 421, 180 N.E. 2d 873 (1st Dist. 1962). The Appellate Court's decision concluded litigation which had been pending for twelve years. Both the Circuit Court of Cook County and the Illinois Appellate Court fully considered and rejected Petitioner's arguments. The Petition for Leave to Appeal to the Illinois Supreme Court was denied by that court. The Master who heard the evidence prepared two long reports, and the Circuit Court Judge, sitting as Chancellor, carefully and thoroughly reviewed the facts and law on exceptions from the Master's Report before entering his order reversing the Master. The Illinois Appellate Court wrote a long, detailed and reasoned opinion. The application and validity of Section 4 of the Illinois Evidence Act have been well considered in this case. There is no need for further review by this Court.

Petitioner does not raise an issue of public policy or concern.

Petitioner's reliance upon *Cole v. Arkansas*, 333 U.S. 196 (1948); *Musser v. Utah*, 333 U.S. 95 (1948); *Von Moltke v. Gillies*, 332 U.S. 708 (1948); and *Mahler v. Eby*, 264 U.S. 32 (1924) as authority for this Court's jurisdiction is sadly misplaced. The narrow holdings in these cases, involving appeals from criminal convictions where constitutional issues were properly raised below or appeals from dismissals of writs of habeas corpus, have no relevance to this case.

Despite Petitioner's attempts to variously characterize the issue presented to this Court, there are no valid grounds to support the review by this Court on writ of certiorari under Supreme Court Rule 19 and the decisions of this Court. This Court does not have jurisdiction under 28 U.S.C. § 1257(3).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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